

¹ See Comments of Ameritech Mobile Services, Inc. at 8 – 9; Paging Networks, Inc. at 21; Metrocall, Inc. at 9 – 10; Celpage, Inc. at 12; Arch Communications Group, Inc. at 12; and Personal Communications Industry Association at 11 – 12; see also Reply Comments of MAP Mobile Communications, Inc. at 6; Paging Networks, Inc. at 4 – 5; Personal Communications Industry Association at 10 – 13; Celpage, Inc. at 6 – 7; and Metrocall, Inc. at 6.

channels [would] be awarded to those, including paging licensees, that value them most highly.” (SR&O at para. 21). In determining that the public interest is served by awarding the licenses for these response channels to the applicants who values the licenses “most highly,” the Commission relied on an auctions revenue test rather than on a determination of the best and most efficient use for the spectrum. This is contrary to Section 309(j) (7)(A) of the Communications Act of 1934, as amended (the Act). Accordingly, the Commission should reconsider its decision and reinstate the paging eligibility restriction for these channels.

In support hereof, the following is shown:

- I. The Commission’s Action to Eliminate the Paging Eligibility Restriction is Contrary to the Public Interest.**
 - A. Elimination of the Paging Response Channel Set-Aside Creates an Impermissible Retroactive Effect.**

The Commission’s decision, more than five years after the close of the Regional Narrowband PCS auction on November 8, 1994, to eliminate the response channel set-aside for paging carriers has a retroactive effect which is contrary to the public interest. In its order establishing the Narrowband Personal Communications Service, the Commission promised eight 12.5 kHz response channels for the sole use by existing common carrier and private paging licensees to upgrade their existing one-way paging operations to “provide some acknowledgement and [two-way] messaging capability.” Amendment of the Commission’s Rules to Establish New Narrowband Personal

Communications Services, First Report and Order, GN Docket No. 90-314, 8 FCC Rcd 7162, 7165 (1993) (First Report and Order).

At the time of the Commission held the Regional Narrowband PCS auction, most paging carriers were under the belief, based upon the Commission's promises reflected in Rule Section 24.130,² that it would be unnecessary to participate in this auction since the Commission had already set aside for incumbent paging carriers, eight 12.5 kHz response channels that could be utilized to convert their existing one-way paging systems to provide advanced two-way paging services. See Comments of Celpage, Inc. at 12 and Metrocall, Inc. at 9 – 10. Because these one-way paging carriers detrimentally relied upon the Commission's existing (and unchallenged) rules when making their strategic plans, it would now be unfair, and contrary to the public interest, to change the playing field at this late date, by making it more difficult for paging carriers to gain access to this spectrum that is necessary to compete as a two-way paging provider. See Yakima Valley Cablevision v. FCC, 794 F.2d 737, 745 – 746 (D.C. Cir. 1986) ("When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive

² Rule Section 24.130 provided in pertinent part, as follows:

- (a) The channels listed in paragraphs (b) and (c) of this section are available to licensees of conventional one-way paging base station licensed pursuant to part 22 or part 90 of this chapter as of the application filing deadline for the paging response channels. Eligibility for response channels shall be based on the authorized service area of each existing paging licensee. . . . Existing paging licensees are eligible to bid for any response channel in any BTA or MTA which encompasses an authorized base station or which is partly or wholly overlapped by a licensee's service area. . . .

modification or rescission of the regulation can cause great mischief.”). In this case, one-way paging carriers made their business plans on the basis of the Commission’s promise in Rule Section 24.130, and determined that it would only be necessary to participate in an auction for the paging response channels. This was because the Commission had promised that only incumbent paging licensees would be eligible for the licenses for the eight 12.5 kHz paging response channels connected to their service areas. As a result, these carriers did not participate in the Regional Narrowband PCS auction(which closed over five years ago, on November 8, 1994) because, from a spectrum standpoint, it was inefficient to acquire additional narrowband PCS spectrum when the Commission had already issued rules reserving eight paging response channels for the incumbent paging carriers so that their one-way paging systems could be converted to two-way paging systems in a spectrally efficient manner. By adopting the set aside of paging response channels for the incumbent one-way paging carriers, the Commission had implicitly determined that the public interest would be served by (i) an efficient use of the spectrum, since incumbent one-way paging carriers would not be required to acquire extra narrowband in order to provide a two-way service, and (ii) increased competition between the narrowband PCS service providers and incumbent paging licensees that converted their systems to two-way operations. Nothing has changed in the narrowband arena which would justify demonstrate that the Commission’s conclusion in the First Report and Order is contrary to the public interest. Accordingly, the Commission should reconsider its decision.

B. Lifting the Paging Eligibility Restriction Exceeded the Commission's Statutory Authority.

The record demonstrates that the Commission's decision to lift the paging eligibility restriction for the eight 12.5 kHz response channels is contrary to the intent of the auction legislation. Section 309(j)(7)(A) of the Act provides, as follows:

(7) CONSIDERATION OF REVENUES IN PUBLIC INTEREST DETERMINATIONS. –

(A) CONSIDERATION PROHIBITED. -- In making a decision pursuant to section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph 4(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection. (underlining added).

In reaching its decision, the Commission found “that removal of eligibility restrictions [would] increase competition for these channels and thereby increase the likelihood that licenses for these channels [would] be awarded to those, including paging licensees, that value them most highly.” See SR&O at para. 21. Simply put, the Commission has decided to remove the paging eligibility restriction for these licenses in order to ensure that it awards the licenses to the entity willing to pay the most money, despite its earlier finding that the public interest would benefit if existing paging carriers are able to compete by upgrading their systems to a two-way format. Since it appears that the Commission is revising its frequency allocation rules in order to maximize

revenues for the Federal treasury, the Commission's action runs contrary to the intent of Section 309(j)(7)(A) of the Act.

C. The Public Interest Would be Served by Retention of the Eligibility Restriction.

The record in this proceeding clearly demonstrates that the Commission's decision in the First Report and Order to set aside the eight 12.5 kHz response channels best serves the public interest. See First Report and Order at 7165; see also Comments of Ameritech Mobile Services, Inc. at 8 – 9; Paging Network, Inc. at 21; Personal Communications Industry Association at 11 – 12; Arch Communications Group at 12. In that proceeding, the Commission recognized that incumbent paging carriers were positioned to compete with narrowband PCS providers for two-way service, and that the public interest would be served by reserving the eight 12.5 kHz response channels for this purpose. And indeed, this finding was a valid one. Paging carriers have hundreds of millions of dollars of existing equipment and infrastructure in the ground that can be upgraded to two-way capability. These carriers also have trained and experienced personnel at all levels.

In the intervening seven years since the release of the First Report and Order, the Commission has taken little or no positive action to foster the continued growth of the paging industry, which it had found to be vibrant and highly competitive. See Paging

Order, First Report and Order, WT Docket No. 69-18, 11 FCC Rcd 16570, 16583 (1996),

wherein the Commission stated:

[T]he paging industry is a dynamic and highly competitive industry that is experiencing rapid growth. . . To meet customer needs and improve service to the public in this highly competitive environment, paging operators need flexibility not only to make modifications within their existing service areas, but to add sites that extend the coverage of their systems into areas of new growth, such as outlying suburbs and new business centers. Even a short-term freeze has the potential to harm the paging industry and the public by deterring this growth and stifling investment. Moreover, the impact of the freeze is felt most acutely by local and regional paging systems, who are prevented from expanding while more than a dozen nationwide carriers operating in each market have no such limitation on their ability to respond to increased demand in high-growth areas.

Instead of continuing to nurture the growth of paging, the Commission (i) froze the paging industry in its tracks by refusing to accept and process site-by site applications for the past four years, which due to the inordinate passage of time, has virtually strangled the paging industry by making it unable to respond to subscriber demands for new or expanded service, (ii) delayed for several years, the auction of the 929/931 MHz paging band and lower band paging channels;³ and (iii) delayed by several years the auction of the narrowband response channels originally reserved for the incumbent paging licensees. As a result, it has become virtually impossible for the one-way paging industry to compete against the plethora of broadband carriers offering advanced wireless services. It is respectfully submitted that the Commission should refrain from making this situation worse, by removing the eligibility restrictions on the response channels. As it stood,

³ The Commission has only just recently concluded the 929/931 MHz Paging Auction (Auction Event No. 26), but has not yet scheduled the lower band paging auction.

there were only eight channels to be coupled with 173 existing paging channels. Notice of Proposed Rulemaking, WT Docket No. 96-18, 11 FCC Rcd. 3108, 3113 (1996).

Therefore, there was already a scenario for robust competition in the auction. If the eligibility restriction is removed, the odds of an incumbent paging licensee obtaining a response channel become miniscule.

It was established in the record that one-way paging carriers will be forced to compete with broadband PCS providers who offer paging and messaging services as ancillary services to their two-way voice offerings. See Comments of Paging Networks, inc. at 21. Without the assurance that the incumbent one-way paging carriers will be able to obtain the spectrum necessary to upgrade their existing one-way paging systems, these carriers, who have been applauded by the Commission for their efficiency and competitiveness, will become stranded in the wireless market place. The importance of these response channels and the fact that one-way paging carriers are best positioned to put these channels to immediate use in order to bring two-way messaging service to the public in urbanized and rural areas justifies reconsideration of the Commission's action. Accordingly, the public interest would be served by retaining the paging eligibility restriction for these eight 12.5 kHz response channels.

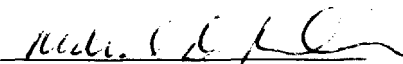
II. Conclusion.

In light of the foregoing, it is respectfully requested that the Commission reconsider its action and reinstate the eligibility restriction for these eight 12.5 kHz paging response channels.

Respectfully submitted,

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Filed: July 6, 2000